

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CRIMINAL ACTION NO. 5:06 CR-00019-R

UNITED STATES OF AMERICA

PLAINTIFF

v.

STEVEN D. GREEN

DEFENDANT

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DECLARE
FEDERAL DEATH PENALTY ACT UNCONSTITUTIONAL, DISMISS SPECIAL
FINDINGS FROM THE INDICTMENT, AND STRIKE THE NOTICE
OF INTENT TO SEEK THE DEATH PENALTY

Comes the United States of America, by counsel, for its response to the motion of the Defendant, Steven D. Green, to declare the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591 *et. seq.*, unconstitutional; to dismiss Special Findings from the Indictment; and strike the notice of intent to seek the death penalty.

A. The Jury's Weighing of Aggravating and Mitigating Factors Is Not an Element of the Offense and the Procedural Safeguards of the Sixth Amendments Do Not Apply.

Green seeks to apply the procedural protections of the Sixth Amendment to the FDPA's requirement that juries weigh aggravating factors against mitigating factors in deciding whether death is the appropriate punishment in a given case.

Green argues that the *Apprendi*¹ and *Ring*² line of cases should extend to the jury's weighing of aggravating versus mitigating factors in a capital sentencing hearing, asserting that

¹*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

²*Ring v. Arizona*, 536 U.S. 584 (2002).

this weighing process equates to a finding of fact that increases the maximum punishment to which the defendant is exposed. If the weighing process is deemed to be an element of the offense, then the Sixth Amendment would require that it be found beyond a reasonable doubt.

In making this claim, Green erroneously equates the weighing process with findings of gateway intent factors (18 U.S.C. § 3591) and statutory aggravating factors (18 U.S.C. § 3592). His error lies in treating all three determinations as determinations of *facts*. The defendant's intent at the time of his crime is a factual matter, as is the determination of any statutory aggravating factor, such as whether the defendant has previously been convicted of a particular type of crime, or whether he engaged in substantial planning and premeditation, or what his motive was in committing the charged crime. These facts all have an independent existence outside the jury deliberation room and it is the jury's duty to determine, or "find," whether a particular alleged fact actually existed or not.

Unlike intent factors and aggravating factors, however, the third and final step in the process by which a jury reaches its determination whether a sentence of death should be imposed -- that is, the jury's weighing process -- does not involve any "finding of fact." The jury's consideration of whether the proven aggravating factors outweigh the proven mitigating factors sufficient to justify a death sentence is not a determination of fact -- rather, it describes the jury's collective consideration of whether a sentence of death is justified in light of the facts of the case. In other words, the comparative weight of the aggravating and mitigating factors, and whether it justifies a death sentence, has no independent existence outside the minds of the jurors in the deliberation room. As such, the weighing process describes a "consideration" and not a "fact."

Green relies on the decisions of four state Supreme Courts for legal support for his claims,³ while candidly acknowledging that other states, and some federal courts considering this claim specifically as related to the FDPA, have reached a contrary conclusion. Unfortunately for the defendant, however, every federal Court of Appeals to have addressed this issue has ruled squarely against the defense. *See, e.g., United States v. Fields*, ___ F. 3d ___ (10th Cir. 2008); *United States v. Mitchell*, 502 F. 3d 931 (9th Cir. 2007); *United States v. Barrett*, 496 F. 3d 1079 (10th Cir. 2007); *United States v. Sampson*, 486 F. 3d 13 (1st Cir. 2007); *United States v. Fields*, 483 F. 3d 313 (5th Cir. 2007); and *United States v. Purkey*, 428 F. 3d 738 (8th Cir. 2005).

Given the overwhelming weight of the persuasive authority, this Court should reject Green's claim.

B. The Indictment was Obtained Consistent with the Requirements of the Fifth and Sixth Amendments.

1. The Grand Jury Does Not Have to be Informed of the Capital Consequences of the Special Findings.

Green next argues that the Indictment is defective because it fails to state that the Special Findings section would subject the defendant to the death penalty, in violation of the Fifth Amendment.

In fact, Supreme Court precedent, as applied in various federal courts, makes clear that the Indictment Clause does not require the government to inform the grand jurors of the potential penalties that attach to their special findings. The Supreme Court has made clear that an indictment need only charge the elements necessary to constitute the offense, and need not charge the ultimate punishment sought for the offense committed. Specifically, the Court stated:

³Defense Motion at pp. 7-8.

It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as “those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.”

United States v. Hamling, 418 U.S. 87, 117 (1974) (quoting *United States v. Carll*, 105 U.S. 611, 612 (1881)).

Even in the aftermath of *Apprendi* and *Ring*, federal courts have continued to distinguish sentencing considerations from the grand jury’s (expanded) role in determining elements of crimes. In *United States v. Haynes*, 269 F. Supp. 2d 970 (W.D. Tenn. 2003), the trial court faced the identical argument as that raised in the instant case. The court pointed out the two basic protections afforded defendants by the indictment clause – protection of the citizenry against unfounded criminal prosecutions, and notice to the defendant of the charges against which he/she must defend. *Haynes*, 269 F. Supp. 2d at 980. Faced with an indictment alleging mens rea and statutory aggravating factors (as is the case at hand), the court cited *Hamling* and *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002), in concluding that the indictment satisfied both purposes of the Fifth Amendment. The special findings in *Haynes* and in the present case were drawn directly from 18 U.S.C. §§ 3591 and 3592, so the defendant here, similar to Mr. Haynes, is unable to claim lack of notice. As to the check on prosecutorial power, the *Haynes* court squarely accepted the grand jury’s fact finding role as sufficiently protecting the defendant’s Fifth Amendment rights. Specifically, the court stated:

The Superceding Indictment also served as a check on prosecutorial power by requiring a grand jury to determine that probable cause exists to warrant the special findings supporting the imposition of the death penalty. *Accord Fell*, 217 F. Supp. 2d at 484 (“When it returned a true bill, the grand jury performed its check on prosecutorial power by determining that probable cause exists to find that the specified mental culpability and aggravating factors exist.”).

Haynes, 269 F. Supp. 2d at 981.

As to Green's remaining claim that the grand jury did not fulfill this role since they were presumably unaware of the consequent death penalty eligibility, the court pointed out that the defendant "cites no authority in support of this assertion and the Court has found none." *Haynes*, 269 F. Supp. 2d at 981. The court proceeded to cite a long line of cases acknowledging that the requisite protection lies in the grand jury's factual determinations, and not in any creation of grand jury support for imposition of a particular sentence.

The defendant's reliance upon a case, *Smith v. United States*, 360 U.S. 1 (1959), in which the Court invalidated the attempt by the prosecution to pursue the death penalty predicated upon the prosecutor filing an Information, as opposed to seeking an Indictment from the grand jury, is so inherently distinct a circumstance from the one at hand that it cannot support the defendant's contention in this case. Similarly, the defendant's contentions that death qualified jurors are not a check on government abuse, or that Attorneys General thwart local prosecutor input, do not alter the well-established precedent that grand jurors should not formally address penalty concerns.

2. The Indictment Alleged All the Elements of a Capital Crime.

Next, Green argues a corollary to the first argument made in his motion. In his first claim, he asserted that the jury's process of weighing aggravating versus mitigating factors in choosing whether to impose the death sentence was the equivalent of an element of a capital offense and that, because the FDPA does not require that process to be conducted under a "beyond a reasonable doubt standard," the FDPA violates the Sixth Amendment. Here, Green asserts that the same weighing process, because it acts as an element under the defendant's understanding of the law, also violates the Fifth Amendment's Indictment Clause because the grand jury did not weigh aggravating versus mitigating factors to determine if the death penalty was justified. For

the same reasons discussed *supra*, the weighing process is not a finding of fact and is not, therefore, the equivalent of an element of the offense. Because it is not an element, the Constitutional procedures that attach to elements under the Fifth and Sixth Amendments do not apply. Consequently, this claim should be rejected.

Green fails to cite any relevant case law supporting any such requirement that the grand jury hear a pre-indictment penalty phase presentation, and indeed the inherently implausible mechanics of such a process are self-evident.

In *United States v. Barnette*, 390 F.3d 775 (4th Cir. 2004), *vacated on other grounds*, *Barnette v. United States*, 546 U.S. 803 (2005), the Court re-stated its recent determination in *Higgs*, that an indictment for capital murder must contain at least one aggravating factor “[b]ecause only one statutory aggravating factor is required under the Act to render a defendant death-eligible.” *Barnette*, 390 F.3d at 784 (*citing United States v. Higgs*, 353 F.3d 281, 299 (4th Cir. 2003)). The clear import of these cases is that no mini-trial on penalty factors before the grand jury is contemplated under the Act or required under *Ring*.

As stated above, relevant case law establishes that the Fifth Amendment’s Indictment Clause is satisfied by a capital indictment with special findings restricted to “gateway” intent factors and at least a single statutory aggravating factor. There is simply no support for Green’s contention that a grand jury penalty phase is necessary. Non-statutory aggravating factors do not increase punishment and, therefore, are not subject to the Indictment Clause.⁴ *See United States v. Regan*, 221 F. Supp. 2d 672, 680-81 (E.D. Va. 2002). Perhaps in a tacit acknowledgment of the implausibility of such a contention, the defendant offers no guidance on how the government

⁴The Indictment in this case does not allege any non-statutory aggravating factors for this very reason.

is supposed to fully and accurately present mitigating factors to the grand jury that the defendant would present to a petit jury at trial.

C. *Ring v. Arizona* Did Not Render the FDPA Unconstitutional.

At the outset, the United States notes that the FDPA has withstood constitutional attacks based on *Ring*, whether directly or indirectly, in every circuit to have considered such claims. See *United States v. Mitchell*, 502 F. 3d 931 (9th Cir. 2007); *United States v. Barrett*, 496 F. 3d 1079 (10th Cir. 2007); *United States v. Sampson*, 486 F. 3d 13 (1st Cir. 2007); *United States v. Brown*, 441 F. 3d 1330 (11th Cir. 2006). Furthermore, Green fails to cite any contrary case law invalidating the FDPA on this (or any other) basis. Indeed, the *Sampson* opinion contains a point-by-point refutation of Defendant's argument relating to *Ring*. *Sampson*, 486 F. 3d at 20-23.

1. Introduction

Green begins by asserting various problems arising with the FDPA because of *Ring*. He argues that the inclusion in the Indictment of special findings relating to the mental culpability and statutory aggravating factors is an impermissible "fix" by the United States of the constitutional deficiency in the FDPA. Specifically, Defendant asserts that under the separation of powers and non-delegation doctrines only Congress can define a new crime of capital murder and correct the alleged constitutional flaws in the statute.⁵ He further contends that the FDPA cannot be "saved" by judicial construction, in part because *Ring* is not a decision about criminal procedures, but about substantive criminal law involving the definition of a crime. For the reasons set forth below, all of Green's arguments lack merit.

⁵Defense Motion, page 18-19.

a. The *Ring* decision

Analysis of Green's argument that *Ring* rendered the Federal Death Penalty Act of 1994 unconstitutional must begin with the Supreme Court's decision in that case. In *Ring*, the Supreme Court did not consider the constitutionality of the FDPA; rather, the Court held that Arizona's death penalty statute was unconstitutional because it provided that a judge alone could decide whether a defendant should be sentenced to death after making findings rendering the defendant eligible for the death penalty in violation of the Sixth Amendment right to trial by jury. *Ring*, 122 S. Ct. at 2432. The Court specifically held that "[c]apital defendant[s] . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* Of course, the FDPA complies with *Ring* because the statute expressly provides for a jury to determine the aggravating factors, unless both the defendant and the United States agree otherwise. *See* 18 U.S.C. § 3593(b).

Left unanswered by *Ring*, however, is whether the Indictment Clause of the Fifth Amendment requires aggravating factors to be charged in the indictment for a defendant to be eligible for the death penalty.⁶ Because the Fifth Amendment right to grand jury indictment does not extend to state prosecutions, *Hurtado v. California*, 110 U.S. 516 (1884), the defendant in *Ring* did not raise the issue of indictment, and it was not specifically addressed by the Court.⁷ However, the Court's ruling that aggravating factors are the "functional equivalent" of elements

⁶ The Indictment Clause of the Fifth Amendment provides in pertinent part as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"

⁷ Indeed, in footnote 4, the Court noted that "Ring does not contend that his indictment was constitutionally defective." *Ring*, 122 S. Ct. at 2437 n.4.

of the offense, which require jury determination, may one day lead the Court to find that the Indictment Clause mandates charging aggravating factors in the indictment. *See Ring*, 122 S. Ct. at 2439 (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt” (*id.*); “Because Arizona’s enumerated aggravating factors operate as the ‘functional equivalent of an element of a greater offense,’ . . . the Sixth Amendment requires that they be found by a jury” (*id.* at 2443)).

On the same day as the *Ring* decision, the Supreme Court also decided *Harris v. United States*, 122 S. Ct. 2406 (2002), in which the Court reaffirmed its previous ruling in *MacMillan v. Pennsylvania*, 477 U.S. 79 (1986), that mandatory minimum sentencing factors need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt, as long as the factors do not increase the maximum possible sentence. *Harris*, 122 S. Ct. at 2420. At the same time, however, the Court made clear in *Harris* that a crime has not been properly alleged, “unless the indictment and the jury verdict include[s] all the facts to which the legislature [has] attached the maximum punishment.” *Id.* at 2417. In discussing the significance of the Indictment Clause, the Court stated: “grand and petit juries . . . form a ‘strong and two-fold barrier . . . between the liberties of the people and the prerogative of the [government].”” *Id.* at 2418 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968)). However, “[i]f the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between the government and defendant fall.” *Id.* at 2419.

The decisions in *Ring* and *Harris* follow from the Supreme Court's earlier decision in *Jones v. United States*, 525 U.S. 227 (1999).⁸ In *Jones*, the Supreme Court held that, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6. The Court noted that the reason for such a requirement is to ensure that safeguards exist as to "the formality of notice, the identity of the fact finder, and the burden of proof." *Id.*

Green erroneously asserts that the Supreme Court held in *Ring* that aggravating factors operate as "essential elements" of a greater offense.⁹ But Green simply reads too much into *Ring*. As the district court in *Lentz* noted, "*Ring* held that Arizona's enumerated aggravating factors operate as 'the *functional equivalent of an element* of a greater offense,' but did not require that such factors become actual elements of a new substantive offense." *Lentz*, 225 F. Supp.2d at 679 (quoting *Ring*, 122 S. Ct. at 2443) (emphasis in original). As the functional equivalent of elements, statutory aggravating factors "must be treated *procedurally* as elements of the offense alleged. *See Sampson*, 486 F. 3d at 21 ("What is involved in the application of *Ring* is a matter of procedure, not of substantive definition regarding death-eligibility."). *Accord Lentz*, 225 F. Supp.2d at 679 (noting that *Jones*, *Apprendi* and *Ring* "merely require additional

⁸*Apprendi v. New Jersey*, 530 U.S. 466 (2000), follows in this progeny as well; however, like *Ring*, *Apprendi* did not implicate the Indictment Clause because it involved a state prosecution. *See Apprendi*, 530 U.S. at 477 n.3.

⁹Defense Motion, p. 19.

procedural protections in the determination of the existence of facts that may increase punishment.”).

With the return of the Indictment, which demonstrates that the charged offense is capital-eligible, the procedures set forth in the FDPA can now be followed to the letter. The United States has already filed the notice required by 18 U.S.C. § 3593(a) setting forth the aggravating factors upon which it intends to rely during the penalty phase as a basis for a death sentence. If the defendant is convicted, the Court will conduct a penalty phase following the remaining procedures set forth in Section 3593. In short, there is absolutely no conflict between *Ring* and the FDPA.¹⁰

b. *United States v. Jackson* is Inapposite

Green relies on *United States v. Jackson*, 390 U.S. 570 (1968), just as other defendants have done. But as reviewing courts have consistently held, *Jackson* is not pertinent. *Jackson* invalidated a provision of the Federal Kidnaping Act, in which only a jury could impose a death sentence. *Id.* at 591. The argument there was that the statute violated the defendant’s right to a jury trial by effectively encouraging, in order to avoid a death sentence, either a guilty plea or waiver of the right. *Id.* at 572-73. The Court rejected the United States’ proposal that the statute could be saved by adopting procedures for a “special jury” that would determine whether death was warranted. *Id.* The Court said the statute could not be saved by creating “from whole cloth a complex and completely novel procedure.” *Id.* at 580.

¹⁰ As the FDPA can be construed in a way that satisfies the requirements of the Indictment Clause, and such a construction is not inconsistent with Congressional intent at the time the statute was enacted (*see infra* at 17-18), Green’s argument that the doctrine of constitutional avoidance does not apply here clearly fails.

Here, however, the processes used to comply with the Supreme Court's holding in *Ring* – presentation to the grand jury of eligibility factors – are neither created from whole cloth nor novel, nor particularly complex. Far from novel, the grand jury has long played a role in establishing the charged elements of an offense, a role which is recognized in the common and statutory law. There is nothing new or complicated, then, about presenting to a grand jury facts that would enable it to find elements of an offense (which, under *Ring*, the eligibility factors must now be treated as). As for the other mechanism for complying with *Ring* – proof to a jury beyond a reasonable doubt of facts that increase the sentence beyond the statutory maximum – the FDPA already provides for this. See 18 U.S.C. §§ 3591(a)(2) & 3593(c). Therefore, the holding in *Jackson* is inapplicable here. See *Sampson*, 486 F.3d at 22 (rejecting defendant's reliance on *Jackson* in challenging FDPA); see also *United States v. Johnson*, 239 F. Supp.2d 924, 938 (N.D. Iowa 2003) (rejecting *Jackson*-based challenge to *Ring* compliance procedures under Anti-Drug Abuse Act).

c. The Relaxed Evidentiary Standard is Valid

Green's final *Ring*-based argument is that the FDPA violates the Constitution by making the Federal Rules of Evidence inapplicable to the sentencing phase. Green begins by noting that the Second Circuit specifically ruled against his position in *United States v. Fell*, 360 F. 3d 135 (2nd Cir. 2004), but he then seeks to undermine that holding by arguing it is irreconcilable with two Supreme Court decisions, *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), and *Crawford v. Washington*, 541 U.S. 36 (2004).

Green fails to note, however, that at least three circuits, all ruling well after *Sattazahn* and *Crawford* were decided, and relying in part on *Fell* as persuasive authority, have held that the federal death penalty is not unconstitutional on this basis. See, e.g., *United States v. Mitchell*,

502 F. 3d 931, 979-80 (9th Cir. 2007) (in rejecting this claim, the court cited favorably to *Fell*.); *United States v. Barrett*, 496 F. 3d 1079, 1109 (10th Cir. 2007) (in reviewing the analogous procedures under Title 21, the court looked to those circuits reviewing the FDPA's procedures, including *Fell*, and found them persuasive, ultimately rejecting the defendant's argument that the inapplicability of the Rules of Evidence to the sentencing hearing rendered the statute unconstitutional.); *United States v. Fulks*, 454 F. 3d 410, 437-38 (4th Cir. 2006)(court rejects this same argument, and also cites *Fell* as persuasive authority). Green is also unable to cite any contrary authority invalidating the FDPA on this basis.

The overwhelming weight of persuasive authority suggests that this Court should reject the defendant's claim.

D. No Presumption of Innocence Problem Exists.

Green asserts that the FDPA creates a presumption of innocence problem, rendering it unconstitutional, because the defendant will have been found guilty of a crime prior to entering the sentencing phase of trial. This claim is without merit and has been rejected by other federal courts. See *United States v. Cheever*, 423 F. Supp. 2d 1181, 1196 (D. Kan. 2006); and *United States v. Williams*, Slip Copy, 2007 WL 2916123, at *5-6 (D. Haw. 2007).

As an initial matter, "even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense." *Delo v. Lashley*, 507 U.S. 272 (1993) (citing *Kentucky v. Whorton*, 441 U.S. 786 (1979)). Given this rule, it is hard to conceive that he would be entitled automatically to such an instruction at the sentencing phase, as a constitutional matter. As such, there is no basis for declaring the FDPA unconstitutional for creating a "presumption of innocence problem."

“An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a “genuine danger” that the jury will convict based on something other than the State’s lawful evidence, proved beyond a reasonable doubt.” *Id.* (citing *Whorton*, 441 U.S., at 789, quoting *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978)). The Supreme Court specifically noted that *Taylor*, which defendant relies on here, was limited to the facts of that case. *Whorton*, 441 U.S. at 789. The totality of the circumstances within a given case must be viewed in order to determine whether a presumption of innocence instruction is constitutionally required, including “all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors.” *Id.*

Here, Green offers no reason to assume such a “genuine danger.” If his case reaches a sentencing phase (at which point this issue would become ripe), the evidence submitted by the United States to the jury will be controlled by this Court. The jury will also be instructed that they cannot find any factor alleged by the United States unless they are unanimously convinced of it beyond a reasonable doubt, based on the admitted evidence. The mere fact that the defendant will already have been found guilty of an offense at the guilt phase does not affect the procedures used in the sentencing phase to ensure that the jury’s decisions are based only on competent evidence, lawfully admitted, and proved beyond a reasonable doubt.

For these reasons, there is no presumption of innocence problem, much less one of constitutional dimension.

WHEREFORE, for the foregoing reasons, the United States respectfully requests that the defendant's Motion to Declare the Federal Death Penalty Act Unconstitutional, Dismiss Special Findings from the Indictment, and Strike the Notice of Intent to Seek the Death Penalty be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 21, 2008, I electronically filed the foregoing response with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren Wolff, counsel for the defendant, Steven D. Green.

/s/ Marisa J. Ford
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